

ZULKIFLI MD RODZI

A

v.

PP

COURT OF APPEAL, PUTRAJAYA

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MOHAMED APANDI ALI JCA

LINTON ALBERT JCA

HAMID SULTAN ABU BACKER JCA

[CRIMINAL APPEAL NO: P-05-424-2010]

22 FEBRUARY 2013

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Chemist's report - Admissibility of - Whether report prepared by government chemist - Whether report satisfied criteria required under s. 399 Criminal Procedure Code ('CPC') - Whether report admissible under s. 45 Evidence Act 1950 - Whether report relevant though couched as a report under s. 399 CPC - Whether case collapsed at prosecution stage due to evidence being expunged - Whether accused acquitted*

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EVIDENCE: *Admissibility - Chemist's report - Whether report prepared by government chemist - Whether report satisfied criteria required under s. 399 Criminal Procedure Code ('CPC') - Whether report admissible under s. 45 Evidence Act 1950 - Whether report relevant though couched as a report under s. 399 CPC - Whether case collapsed at prosecution stage due to evidence being expunged - Whether accused acquitted*

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This was an appeal by the appellant ('accused') against his conviction and sentence imposed by the High Court in relation to the charge under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The accused was charged for trafficking in 9,623 grams of cannabis. In this appeal, a pertinent question of law was raised in relation to the chemist's report ('exh. P13') prepared by SP5 whose status was referred to as "Pegawai Sains, Jabatan Kimia" and exh. P13 was stated as a report under s. 399 of the Criminal Procedure Code ('CPC'). It was argued that the said report did not satisfy the criteria required under s. 399 of the CPC but despite the objection, exh. P13 was marked as an exhibit. In light of this, the prosecution argued that exh. P13 could still be admitted under s. 45 of the Evidence Act 1950 ('the Act') if at all it could not be admitted under s. 399 of the CPC.

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**A Held (allowing appeal; setting aside order of the High Court)
Per Hamid Sultan Abu Backer JCA delivering the judgment
of the court:**

- B** (1) It was clear that SP5 was not a government chemist though his function relates to the work of a chemist. In essence, if the report was not from the government chemist, it was not admissible and had no relevance for the purpose of s. 399 of the CPC even though it was couched as a report under s. 399. (para 9)
- C** (2) The argument that exh. P13 could be admitted under s. 45 of the Act could not be sustained as it is trite that if a special procedure is prescribed under the Act, then the general provisions found in the Act or other Acts cannot be followed. This principle is expressed by the maxim *generalia specialibus non derogant*. (para 10)
- D**
- E** (3) The evidence of SP5 and also exh. P13 had to be expunged. Once expunged, the prosecution's case would have collapsed at the prosecution stage as the elements of the charge would not have been established and the accused had to be acquitted and discharged. (para 11)
- F** (4) Save for the issue under s. 399 of the CPC, the court was satisfied that the learned trial judge had not misdirected himself as averred in the petition of appeal. The learned trial judge had directed his mind to the relevant issues and had acted in accordance with the law. However, the appeal was allowed solely on the issue of s. 399 CPC. The accused was thus acquitted and discharged. (paras 16 & 17)

G Bahasa Malaysia Translation Of Headnotes

- Ini adalah rayuan perayu ('tertuduh') terhadap sabitan dan hukuman yang dijatuhkan oleh Mahkamah Tinggi berkenaan pertuduhan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952.
- H** Tertuduh telah dituduh dengan mengedar 9,623 gram kanabis. Di dalam rayuan ini, soalan yang dibangkitkan adalah berkenaan laporan ahli kimia ('eks. P13') yang disediakan oleh SP5 di mana statusnya dirujuk sebagai Pegawai Sains, Jabatan Kimia dan eks. P13 telah dinyatakan sebagai laporan di bawah s. 399 Kanun
- I** Tatacara Jenayah ('KTJ'). Ia dihujahkan bahawa laporan tersebut

tidak memenuhi kehendak di bawah s. 399 KTJ dan walaupun dibantah, eks. P13 masih ditanda sebagai salah satu eksibit. Berkenaan ini, pihak pendakwaan berhujah bahawa eks. P13 masih boleh diterima di bawah s. 45 Akta Keterangan 1950 ('Akta') jika ia tidak boleh diterima di bawah s. 399 KTJ.

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Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)

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Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Adalah jelas bahawa SP5 bukanlah seorang ahli kimia kerajaan walaupun fungsi beliau adalah berkaitan dengan kerja seorang ahli kimia. Jika laporan tidak disediakan oleh ahli kimia kerajaan, ia tidak boleh diterima dan tidak relevan bagi kehendak s. 399 KTJ walaupun ia diperihalkan sebagai laporan di bawah s. 399.

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(2) Penghujahan bahawa eks. P13 boleh diterima di bawah s. 45 Akta tidak boleh dipertahankan memandangkan ia adalah nyata bahawa jika prosedur khas ditetapkan di bawah Akta, maka peruntukan am yang dijumpai di bawah Akta atau Akta-Akta lain tidak boleh diikuti. Prinsip ini dinyatakan oleh maxim *generalia specialibus non derogant*.

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(3) Keterangan SP5 dan juga eks. P13 terpaksa dibuang. Apabila ia dibuang, kes pihak pendakwaan akan gagal pada peringkat pendakwaan memandangkan elemen-elemen pertuduhan belum dibuktikan dan tertuduh perlu dilepaskan dan dibebaskan.

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(4) Selain daripada isu di bawah s. 399 KTJ, mahkamah berpuas hati bahawa yang arif hakim perbicaraan tidak tersalah arah seperti dinyatakan dalam petisyen rayuan. Yang arif hakim perbicaraan telah mengarah minda beliau kepada isu-isu relevan dan telah bertindak mengikut kehendak undang-undang. Walau bagaimanapun, rayuan dibenarkan hanya atas isu s. 399 KTJ. Tertuduh dengan itu telah dilepaskan dan dibebaskan.

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Case(s) referred to:

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Baldeo and Others v. Emperor 1940 AIR Alahabad 263 (*refd*)

Bhaskaran v. State, 1967 Ker LT 165 (*refd*)

Lee Chee Meng v. PP [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC (*refd*)

Peary Lal v. Emperor, AIR 1938 Lah 496 (*refd*)

PP v. Badrulsham Baharom [1987] 1 LNS 72 HC (*refd*)

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PP v. Chong Wei Kian [1990] 2 CLJ 435; [1990] 2 CLJ (Rep) 690 HC (*refd*)

- A *PP v. Kau Joo Huat* [1988] 1 CLJ 477; [1988] 1 CLJ (Rep) 258 SC (*refd*)
PP v. Lin Lian Chen [1990] 2 CLJ 1020; [1990] 2 CLJ (Rep) 746 HC (*refd*)
PP v. Mohd Aszzid Abdullah [2008] 1 MLJ 281 (*refd*)
PP v. Sandara Margaret Birch [1997] 1 MLJ 129 (*refd*)
- B *PP v. Yap Boon Chang* [1992] 2 CLJ 1257; [1992] 3 CLJ (Rep) 454 HC (*refd*)
Yap Chin Chai v. PP [2010] 4 CLJ 693 CA (*refd*)

Legislation referred to:

Criminal Procedure Code, s. 399

- C Dangerous Drugs Act 1952, ss. 39B(1)(a), 399(2)(c)
Evidence Act 1950, s. 45

Criminal Code [Ind], s. 293

Other source(s) referred to:

- D Hamid Sultan Abu Backer, *Md Desa v. PP, A Classic Display of Judicial Vigilance* [1997] 1 MLJ LXXXIII
Ratanlal & Dhirajlal, *The Code of Criminal Procedure*, 13th edn, 1987, p 304
- E *For the appellant - Mohd Ismail Mohamed*
For the respondent - Samihah Rhazali; AG's Chambers
[Appeal from High Court, Pulau Pinang; Suit No: 45-15-2009]
Reported by Kumitha Abd Majid

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JUDGMENT**Hamid Sultan Abu Backer JCA:**

- G [1] This is our judgment in respect of the appellant's appeal against conviction and the sentence of death. This matter came up for hearing on 22 January 2013 and we reserved judgment. This is our judgment.
- H [2] The appellant was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and the charge reads as follows:
- I Bahawa kamu pada 21hb November 2008, jam lebih kurang 11.30 malam, bertempat di alamat SBH 253 PBA A, Pantai Kamloon, Kepala Batas, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah mengedarkan dadah berbahaya iaitu sejumlah berat 9,623 gram cannabis dan dengan itu, kamu telah

melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

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[3] The brief facts of the case have been well articulated by the learned JC in his 34 page judgment. It can be summarised as follows:

B

The Prosecution Case

PW4, Insp Muhamad Izham bin Abd Talib testified that acting on information, on 21 November 2008 at about 11.30pm, he and PW8, Insp Mohamad Muzamil bin Esmaon and a team of ten policemen from the Kepala Batas IPD, Seberang Perai Utara raided a house at SBH 253, PBA A, Pantai Kamloon, Kepala Batas, Seberang Perai Utara, Penang. They were all in plain clothes and departed to the scene on their motorcycles. They parked about 30 to 50 metres away from the scene.

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PW4 saw that the premise was a village house made of wood. The door to the house was closed but unlocked. PW4 pushed opened the door and entered the house. PW4 saw a Malay man who was holding a plastic packet in the living room. The Malay man was later identified as Mohammad Fariz bin Ismail (PW6). PW4 identified himself as police to PW6 and conducted a body search but did not find any incriminating items.

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PW4 and three of his team members went to the room at the left side of the house and pushed open the closed door. PW4 saw the appellant inside the room and identified himself as police. The appellant was not wearing any clothes except pants. PW4 testified that when he identified himself as police, the appellant was seen at unease and tried to flee the scene. PW4 apprehended the appellant and conducted a body search but found nothing incriminating. PW4 asked the appellant whether he had kept any contraband and the appellant replied "ada". At this juncture, PW4 cautioned the appellant under s. 37A(1)(b) of the Dangerous Drugs Act 1952.

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PW4 observed inside the room and saw a few cardboard boxes, a wooden cupboard and a shirt hanging at the side of the cupboard. PW4 opened the cupboard doors and found a

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A black plastic bag on the cupboard's floor. PW4 took out the black plastic bag and opened it. Inside the plastic bag, PW4 found 14 slabs of substances suspected to be ganja.

B PW4 then searched the room and found a packet of transparent plastic containing several transparent plastic packets.

[4] The petition of appeal says as follows:

C (i) Yang Arif Pesuruhjaya Kehakiman Mahkamah Tinggi telah silap dari segi fakta dan undang-undang kerana membuat kesilapan membenarkan pintu bilik dikunci dari luar.

D (ii) Yang Arif Pesuruhjaya Kehakiman Mahkamah Tinggi telah silap dari segi fakta dan undang-undang kerana mempercayai keterangan Pasukan polis yang membuat serbuan SP4 SP9 memberi keterangan palsu dan tidak menimbang langsung keterangan SP2 jurufoto.

E (iii) Yang Arif Pesuruhjaya Penghakiman Tinggi telah silap dari segi fakta dan undang-undang kerana menerima pakai keterangan SP5 seorang pegawai sains dan bukan seorang ahli kimia kerajaan.

F (iv) Yang Arif Pesuruhjaya Penghakiman telah silap dari segi fakta dan undang-undang kerana memutuskan yang perayu mempunyai 'possession, custody, control dan occupier' bersangkut barang kes yang dijumpai.

(v) Yang Arif Pesuruhjaya Penghakiman telah silap dari segi fakta dan undang-undang kerana memutuskan ada kes *prima facie* atas perayu dan memanggil perayu membela diri.

G (vi) Yang Arif Pesuruhjaya Penghakiman telah silap dari segi fakta dan undang-undang kerana memutuskan perayu bersalah dalam kes ini.

H (vii) Yang Arif Pesuruhjaya Penghakiman telah silap dari segi fakta dan undang-undang kerana tidak menimbangkan yang PW13 sebenarnya pengedar dalam kes ini.

I (viii) Untuk kesemua atau mana-mana satu alasan yang dicatit di atas perayu memohon rayuannya dibenarkan dan hukuman diketepikan.

[5] Learned counsel for the appellant relied *inter alia* on the following cases to drive home the point namely: A

(i) *PP v. Yap Boon Chang* [1992] 2 CLJ 1257; [1992] 3 CLJ (Rep) 454

(ii) *Yap Chin Chai v. PP* [2010] 4 CLJ 693 B

(iii) *Lee Chee Meng v. PP* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168; [1992] 1 MLJ 322

(iv) *PP v. Badrulsham Baharom* [1987] 1 LNS 72; [1988] 2 MLJ 585 C

(v) *PP v. Kau Joo Huat* [1988] 1 CLJ 477; [1988] 1 CLJ (Rep) 258; [1988] 2 MLJ 91

(vi) *PP v. Chong Wei Kian* [1990] 2 CLJ 435; [1990] 2 CLJ (Rep) 690; [1990] 3 MLJ 165 D

(vii) *PP v. Lin Lian Chen* [1990] 2 CLJ 1020; [1990] 2 CLJ (Rep) 746; [1991] 1 MLJ 316

[6] In the instant case a pertinent question of law was raised. The chemist's report was tendered as exh. P13 by SP5 Marwani binti Abdul Rahman whose status is referred to as "Pegawai Sains, Jabatan Kimia" and that report which states that it is a report under s. 399 of the Criminal Procedure Code (CPC) does not satisfy the criteria required under the said section. (see *PP v. Lin Lian Chen*). Despite the objection of the defence the said report was marked as exhibit. Learned Deputy Public Prosecutor before us argues that it can be admitted pursuant to s. 45 of the Evidence Act 1950 (EA 1950), if at all it cannot be admitted under s. 399 of the CPC. Both the counsels were not able to furnish us with authorities in support of their contentions and in consequence the judgment was reserved. Exhibit P13 *inter alia* reads as follows: E
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JABATAN KIMIA MALAYSIA
Kementerian Sains, Teknologi dan Inovasi H

No. Makmal: (PP) FOR 3586/08-0

LAPORAN DI BAWAH SEKSYEN 399 KANUN TATACARA
JENAYAH I

Saya MAWARNI BINTI ABDUL RAHMAN, Pegawai Sains yang berkhidmat di Jabatan Kimia Malaysia dengan ini memperakui bahawa pada jam 0930 pada 12/12/2008 telah diserahkan kepada

A saya oleh Ahli Kimia ROSNI BINTI HAMID, satu bungkusan kota bertanda “(E)” yang termeterai “POLIS DIRAJA MALAYSIA 40” yang terlebih dahulu diterima oleh beliau daripada C/Insp. 14386 Salim bin Emin pada jam 1535 pada 28/11/2008.

B Saya telah memeriksa bungkusan “(E)” itu dan mendapati di dalamnya sebuah kotak berisi 14 bungkusan plastik bertanda “S1” hingga “S14”. Di dalam setiap bungkusan plastik itu ada satu bongkah bahan tumbuhan mampat. Setelah dianalisa, saya dapati kesemua bahan tumbuhan tersebut ialah “cannabis”.

C Berat bersih tumbuhan “cannabis” tersebut ialah seperti berikut:

Bil.	Tanda	Berat Bersih (gram)
1.	S1	702
2.	S2	801
3.	S3	544
4. - 14	S4 hingga S14	
	Jumlah	9623

t.t.

...

MAWARNI BINTI ABDUL RAHMAN
Pegawai Sains
Jabatan Kimia Malaysia

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[7] Section 399 of the CPC reads as follows:

- (1) Any document purporting to be a report under the hand of any of the persons mentioned in sub-s. (2) upon any person, matter or thing or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless that person or Registrar shall be required to attend as a witness:
- (a) by the court; or
- (b) by the accused in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial.

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(2) The following are persons to whom the provisions of this section apply:

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(a) officer of the Institute for Medical Research;

(b) Government Medical Officers;

(c) chemists in the employment of any Government in Malaysia or of the Government of Singapore;

C

(d) any person appointed by the Minister by notification in the Gazette, to be a Document Examiner;

D

(e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in Malaysia; and

(f) any person or class of persons to whom the Minister by notification in the Gazette declares that the provisions of this section shall apply.

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(3) The persons referred to in sub-s. (2) and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands.

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[8] In the instant case it is not in dispute that s. 399(2)(c) is the relevant part and the prosecution concedes that SP5 is not a chemist and the evidence of SP5 also clearly shows that he is not a chemist. That part of the evidence reads as follows:

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T.P.R.: “Kenapa awak digelar sebagai Pegawai Sains tapi bukan Ahli Kimia?”

SP5: “Saya bertugas sebagai Pegawai Sains kerana saya memiliki Ijazah Sarjana Muda dengan kepujian dalam bidang sains forensic dari Universiti Sains Malaysia (USM) tahun 2005. Sebagai pegawai sains yang memiliki gelaran Ahli Kimia mereka memiliki Ijazah Sarjana Muda dalam bidang kimia dan berdaftar dengan Institut Kimia.”

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- A T.P.R.: “Walaupun awak tidak bergelar Ahli Kimia dan tidak memiliki Ijazah Sarjana Muda dalam bidang kimia serta tidak berdaftar dengan Institut Kimia adakah awak dibenarkan menjalankan analisa ke atas dadah?”
- B SP5: “Saya dibenarkan menjalankan analisa ke atas bahan-bahan yang disyaki mengandungi dadah, tugas Pegawai Sains dan Ahli Kimia adalah sama, yang membezakan ialah Ahli Kimia berdaftar dengan IKM tetapi Pegawai Sains tidak berdaftar dengan IKM. IKM ialah Institut Kimia Malaysia.”
- C [9] From the evidence of SP5 it is clear that he is not a government chemist though his function relates to the work of the chemist. In essence, if the report is not from the government chemist it is not admissible and has no relevance for purpose of s. 399 of the CPC even though it was couched as a report under
- D s. 399 of the CPC. Support for the proposition is found in a number of cases in India, even though there is no equipollent section such as s. 399 of the CPC in India. Section 293 of the Indian Criminal Code which deals with similar issues, and the commentary to the said section by the learned author of Ratanlal & Dhirajlal, 13th edn. 1987 to *The Code of Criminal Procedure* at
- E p. 304 reads as follows:
- F This section makes provision for accepting in evidence reports made by certain Government Scientific Experts. It applies to the report of a “Chemical Examiner or Assistant Chemical Examiner”. It does not extend to the report made by an Additional Chemical Examiner [*Atul Muchi*, (1984) 10 Cal 1026], or the Professor of Anatomy at the Government Medical College. [*Ahilya* (1922) 24 Bom LR 803, 47 Bom 74].
- G [10] The learned Deputy Public Prosecutor’s argument that exh. P13 can be admitted under s. 45 EA 1950 cannot be sustained as it is trite that if a special procedure is prescribed under the Act then the general provisions found in the Act or other Acts cannot be followed. This principle is expressed by the
- H *maxim genaralia specialibus non derogant*. (see *PP v. Sandara Margaret Birch* [1997] 1 MLJ 129; *Baldeo and Others v. Emperor* 1940 AIR Alahabad 263; Article by Hamid Sultan bin Abu Backer – *Md Desa v. PP – A classic display of judicial vigilance* [1997] 1 MLJ LXXXIII]. The courts in India have gone to the extent of saying
- I that if the report does not comply with the said section then for purpose of admissibility it is nothing more than a ‘little scrap paper

... it is not legal evidence' (see *Peary Lal v. Emperor*, AIR 1938 Lah 496]. In essence the court is not bound to accept and act on such report as conclusive evidence of its contents. (see *Bhaskaran v. State*, 1967 Ker LT 165).

A

[11] In the instant case the evidence of SP5 and also his report exh. P13 has to be expunged. Once it has been expunged the prosecution's case would have collapsed at the prosecution stage as the elements of the charge would not have been established and the accused had to be acquitted and discharged.

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Merits

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[12] In the instant case, the petition of appeal except on the issue of s. 399 relates to one of finding of facts. The learned JC has meticulously dealt with the issues raised in the petition of appeal where relevant and material to justify conviction and sentence according to law. We do not think it is necessary to set out the facts in any detail and the findings of the learned JC save to deal with the core issues.

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[13] On the first ground relating to door being locked, the learned JC has dealt in his judgment and made the following observations:

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Mengikut logik, jika pintu bilik telah dikunci dari luar, tentulah tidak ada orang di dalamnya dan tidak begitu cemas untuk SP4 dan anggotanya memberi fokus terlebih dahulu ke atas bilik tersebut dan lebih pragmatik bagi mereka terus menggeledah bahagian lain rumah terlebih dahulu.

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[14] The 2nd and 7th grounds are also in relation to finding of facts, which is based on evidence. The other grounds namely 4th, 5th and 6th are decisions according to law based on primary facts and findings of the learned JC.

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[15] In the instant case 13 witnesses had given evidence for the prosecution. The appellant was found in the room not wearing any clothes except pants. When PW4 identified himself as police, he panicked and tried to flee. He was apprehended and drugs (ganja) were recovered from the room. The learned DPP has dealt in the submission and have dealt with the issues raised by the appellant in the petition of appeal. We are in total agreement except on the issue relating to s. 399 of the CPC.

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- A [16] In the instant case, we have carefully examined the complaints, the judgment and the evidence save for the s. 399 issue, we are satisfied that the learned trial judge has not misdirected himself as averred in the petition of appeal. In the instant case we are satisfied that the learned JC had directed his
- B mind to the relevant issues and had acted in accordance with the law with the full cognizance of the maximum evaluation and beyond reasonable doubt test as propounded by case laws. (see *PP v. Mohd Aszzid Abdullah* [2008] 1 MLJ 281).
- C [17] After having given much consideration to the submission of the learned Deputy Public Prosecutor, we take the view that it is a fit and proper case to allow the appeal solely on the issue of s. 399 of the CPC and we would like to make it clear that we would have dismissed the appeal on merits. In consequence the
- D appeal is allowed. The order of conviction and sentence of the High Court is set aside. The accused is acquitted and discharged.

We hereby order so.

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